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By: Watson for Def.

Filed April 16, 1900.

SUPREME COURT

OF THE

UNITED STATES.

Newman Erb, as Receiver of The Kansas City Wyandotte and Northwestern Railroad Company,

Plaintiff in Error,

vs.

Otto J. Morasch and Elisa Morasch, as Next of Kin of Irene Morasch, Deceased,

Defendants in Error.

249

In Error to the Supreme Court of the State of Kansas.

BRIEF OF DEFENDANTS IN ERROR.

GEORGE B. WATSON,
Attorney for Defendants in Error.

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BRIEF OF DEFENDANTS IN ERROR.

Owing to the inability of defendants in error to pay the cost of printing a brief of much length, the argument

in their behalf will necessarily be limited and directed to only such points as may warrant the affirmance of the judgment of the court below.

* * * * *

The statement of facts and quotations of testimony by plaintiff in error are in the main correct, but there are several important omissions and misconstructions thereof to which attention will be called in the course of argument.

THE ALLEGED ERRORS.

Counsel for Plaintiff in Error in their brief urge but two grounds for error, viz:

I

The unconstitutionality of Ordinance No. 522 of Kansas City, Kansas, regulating the speed of railway trains within the city limits.

II

The non-liability of Plaintiff in Error, he being a federal receiver, to Defendants in Error for injuries occasioned because of a violation of said ordinance.

As these are both questions of law, the object of quoting in counsel's brief (pp. 5 to 10, 22 and 23) portions of the testimony of some of the witnesses and of the findings of the jury at the original trial of the cause (and wholly irrelevant to the issues herein) is not apparent. They will, however, be replied to in that order.

I.

CONSTITUTIONALITY OF THE ORDINANCE.

In the first place, after charging generally wantonness and recklessness, as quoted by counsel (brief p. 4) from the petition of the original plaintiffs, it was alleged the injury occurred because:

"Said train of cars was being driven and run at a high and dangerous rate of speed at the time of the accident through and within the corporate limits of the City of Kansas City, contrary to the ordinance of said city in such case made and provided."

Said petition was never attacked by any motion to make it more specific, definite or certain.

The answer filed in said cause (paragraph third, record p. 13) simply denies "that there is any ordinance of the City of Kansas City, Kansas, regarding the speed of locomotives."

It is insisted, however, (pp, 10, 11, 12, 13 and record pp. 59, 90, 94, 95, 98, 101), that because in the briefs of plaintiffs in error, the constitutionality of said ordinance as being violative of the fourteenth amendment to the constitution was raised in the Kansas Court of Appeals and in the Supreme Court of said state, such question is here for review.

It is a well understood rule of pleading that when the unconstitutionality of an act (or ordinance) is relied on as a matter of defense, its defects must be specifically pointed out. The answer of Erb, receiver, merely denied that

there was "any ordinance," and it must follow that his attempt to raise the question of the unconstitutionality of Ordinance No. 522 of Kansas City, Kansas, in the Kansas Court of Appeals and in the Supreme Court of said state, as being in contravention of the fourteenth amendment to the federal constitution, came entirely too late and cannot now be here considered. There was no pleading upon which to base any such contention.

But waiving, for the sake of argument only, the insufficiency of pleading of a federal question, it will appear that said Ordinance No. 522 was entirely constitutional.

By the uncontradicted testimony of W. S. Carroll and W. H. H. Freeman it was proven that the Inter-State Rapid Transit Railway Company, exempted from the provisions of said Ordinance No. 522 and upon the exception of which the plaintiff in error assails the said ordinance, was and always had been merely a street railway, originally operated by steam, though more recently and at the time of the accident by electricity.

Witness Carroll testified (record pp. 52-53):

Q. How long have you known of the operation of what has always been publicly known as the Elevated railroad, formerly the Interstate Rapid Transit Railway Company?

A. Since its operation in the city. I would have to study to find out when it was started first. I have known it since it was originally operated in the city. * * * *

Q. Tell the jury what kind of a traffic it does.

A. It has an ordinary street railway track.

Q. Have you ever seen it carrying any freight of any kind or character?

A. No; it is not a railroad of that character.

Q. What is its general business?

A. Its general business is that of a traffic railroad—street railway—for the conduct or carriage of passengers only from point to point within the corporate limits, and sometimes without, as it lies without.

Q. Where it runs without the corporate limits of the city, where does it go?

A. This road runs to Kansas City, Missouri. * * *

Q. Do you know what motive power was used in the operation of this Interstate Rapid Transit Railway last June?

* * * * *

A. It was electric motive power."

Witness Freeman testified (*record pp. 55-56*):

Q. "Do you know what is publicly called the Elevated road, formerly used to be the Interstate Rapid Transit Railway Company?

A. Yes, sir.

Q. You have seen it in operation?

A. Yes, sir.

Q. Almost daily since your residence in the city?

A. Yes, sir; I can say daily.

Q. What kind of traffic has it been engaged in ever since you have known it?

A. Carrying passengers.

Q. Did you ever see it carrying any freight?

A. I think not.

Q. Carrying passengers where?

A. Different parts of the city.

Q. Do you know what the uniform fare upon that railroad has been?

A. I think so.

Q. You may state to the jury.

Objected to.

A. A nickel."

Wm. Richardson, engineer in charge of the train at the time of the accident, testified, (record pp. 34, 35):

Q. "How fast was your train going immediately before the accident?

A. Well, before the accident, I was going probably * * * between 12 and 15 miles an hour.

Q. Between 12 and 15 miles an hour?

A. When I first seen it, yes sir; but I slacked up some before it happened.

Q. Now, as you neared the place of the accident, did you see an object on track or near the railroad?

A. No, sir; I seen that baby—I didn't see it—it wasn't on the track; it came on the outside of the track. I seen it first when it came up out of the weeds and got up on the track. I thought it was a chicken and I hadn't slacked up any; then at that time I seen it raise up and stand on its feet; I seen it was a child; then I was about three rails' lengths—about ninety feet—from the baby then.

Q. About ninety feet from the baby when you saw it was a baby?

A. Yes.

Q. How far were you away from what you took for a chicken when you first saw it?

A. Well, I was about two or three more rail lengths when I first saw it.

Q. Well, probably 150 or 200 feet?

A. No; probably 120 feet.

Q. One hundred and twenty feet?

A. One hundred and twenty feet to one hundred and forty feet.

* * * * *

Q. About how many rail lengths east of the child were you when you first saw what you took for a chicken?

A. About five or six.

Q. Do you know the length of those rails?

A. Yes, sir; 30 feet.

* * * * *

Q. Were the brakes in good condition that morning?

A. Yes, sir.

Q. The air worked perfectly?

A. Yes, sir.

Q. Now, say, going 12 miles an hour with the engine and brake in the condition your train was that morning, there being two coaches upon it, in what distance can you stop your train on an up grade as that was?

A. Going 12 miles an hour?

Q. Yes, sir.

A. Well, about an engine and two or three coaches lengths—about 200 feet.

* * * *

Q. How many coaches or cars in the train that day?

A. Two.

* * * *

Q. Now, with the train going six miles an hour, composed of an engine and two coaches, on a grade like that was and with your air and brakes in perfect condition, in what distance can you stop the train?

A. Well, stop the train in about 40 or 50 feet—six miles an hour."

From the above testimony of the engineer it appears that if he had been running his engine at the rate of six miles an hour, he could have stopped the train long before the collision, even after he discovered it was a child on the track; and in all probability he could have avoided the accident if he had attempted to bring his train under control after he noticed the object on the track—the nature of which was doubtful—as he was bound to do.

Mo. Pac. Ry Co. vs. Prewitt, (Kan. Ct. of App. So. Dept.), 51, Pac. 923.

By the testimony of witnesses Carroll and Freeman herein before quoted, the Interstate Rapid Transit Railway Company, which was excepted from the operation of the provisions of Ordinance No. 522, was shown to be an ordinary street railway, for the carriage of passengers only, between points in the cities of Kansas City in Missouri and Kansas for the uniform fare of five cents, and at the time of the accident, its motive power was electricity.

That ordinances of cities, as well as acts of the legislature, may discriminate and distinguish between the rates of speed to be observed within the corporate limits of a city by ordinary railroads with their ponderous trains and street cars, needs neither argument nor the citation of authority.

The running of a railroad train at a greater rate of speed than that designated by a city ordinance is negligence on the part of the company. Th ordinance was not void, and was competent evidence to be admitted in the case.

Meek vs. Penna Co., 38 Ohio St. 632.

Correll vs. Railroad Co., 38 Ia. 120.

That a classification of railroads, cities, corporations etc., may properly be made and are not invalid or violative of any constitutional provisions vid:

Railroad Company vs. Richmond, 96 U. S. 521, and the recently decided case of :

Clark vs. Kansas City, Kansas, 20 Sup. ct. Rep. 234.

II

Are federal receivers liable for damages occasioned by violations of police regulations?

The act of Congress permits receivers to be sued in State courts without leave from the court whose officers they are.

Receivers are liable for the negligent acts of employees

the same as the original company was.

Rouse vs. Hornsby, 67 Fed. (C. C. A.) 219.

It will not be contended by opposing counsel but that the city had power under legislative authority to enact police regulations to govern the speed of the trains within its corporate limits.

Some surprise may justly be manifested at the position taken in the brief.

It will be observed that in all the cases (Missouri cases only) cited in support of their second proposition, city ordinances were declared upon as the basis of the liability sought to be enforced, and the question was not —as here—as to their admissibility in evidence tending to show negligence. Negligence is the gist of this action. If murder, burglary, arson, assault, or other crime occasion civil damage, the criminal law may punish; but that is not the basis for recovery in a civil suit. Neither is it the ordinance in question upon which this action was based. It was merely evidence of negligence. Every person has a right to presume that every other person —even railroads—will be law-abiding, and observe such police regulations as commend themselves to the public mind as necessary for the protection of life and property. And there is a respectable line of authority that a violation of such regulations as limit the speed of trains in city limits constitutes negligence per se.

In the Meek and Coverell cases, before referred to,

the better rule is adopted of admitting such ordinances as evidence of negligence. This rule the Supreme Court of Kansas here followed:

It is therefore respectfully submitted that ordinance 522 of Kansas City, Kansas, is valid and constitutional; that no federal question is raised in the record; that no error was committed in this cause by the Supreme Court of Kansas and that its judgment should be affirmed.

GEORGE B. WATSON,

Attorney for Defendants in Error.